JD–45–10
Detroit, Michigan

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SEIU HEALTHCARE MICHIGAN

and Case 7-CA-52402

STEFANI PIPKINS, an Individual

Judith A. Champa, Esq., for the General Counsel.

David R. Radtke, Esq. (Klimist, McKnight, Sale, McClow and Canzano, P.C.), of Southfield, Michigan, for the Respondent.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of a complaint and notice of hearing issued on January 8, 2010, against SEIU Healthcare Michigan (the Respondent or the Union), stemming from unfair labor practice (ULP) charges filed by Stefani Pipkins, an individual. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Pipkins because of her protected concerted activities.

Pursuant to notice, I conducted a trial in Detroit, Michigan, on June 7 and 8, 2010, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issue

Did the Respondent, on September 17, 2009,[1] discharge Member Representative (MR) Stefani Pipkins because she concertedly complained and expressed concerns in about July and August about the requirements imposed on MR's to obtain member surveys, or because Pipkins showed

[1] All dates hereinafter occurred in 2009 unless otherwise indicated.

disrespect to Union President Marge Faville at a September 15 general membership meeting and then failed on September 16 or 17 to submit an action plan as she had promised?

Witnesses and Credibility

The General Counsel called Pipkins; Lavette Flucker, former director of representation, who resigned in October and ran unsuccessfully against Faville for president in January 2010, and who knew Pipkins socially; Grace Frazier, an employee of Team Mental Health (TMH) who spoke at the September 15 meeting; Marcus Furlow, a former MR, who was terminated in February 2010;[2] and Laura Johnstone, former director of education and training, who was terminated in October. Thus, the General Counsel had no current employees as witnesses.

The Respondent similarly called no current rank-and-file employees. All of its witnesses were managerial or supervisory: Faville; Marcella Clark, assistant organizing director; Johnnie Jolliffi, director of the member services department (and secretary-treasurer since November); and Sandra McMillan, director of negotiations.

Pipkins, Flucker, and Furlow for the General Counsel, and Faville for the Respondent, were chief witnesses, in that they testified on a broad range of pertinent matters. The other witnesses on both sides offered testimony on more limited subjects. Of these chief witnesses, Faville offered the most detailed and consistent testimony and was the most specific as to dates. I note that the dates of relevant events were almost wholly established through witness testimony rather than from documents such as meeting announcements, minutes, or memoranda.

On the other hand, Pipkins was not a credible witness. She was uncertain and often confusing on dates and the sequence of events; she described meetings or conference calls between Faville and the MR's that no other witnesses corroborated—or even mentioned; she testified that she accused Faville of racial discrimination at the August 28 meeting but admittedly said nothing in her affidavit about ever raising the subject to Faville; and she seemed to be attempting to inflate her role at meetings with Faville. I note Furlow's testimony that, as a union steward, he was one of the spokespersons for the MR's and frequently spoke on their behalf. According to his accounts, Pipkins played a smaller part in those meetings than she depicted.

For the above reasons, where Pipkins' testimony differed from that of Faville and other witnesses, I generally credit their versions. As I stated at trial, I draw no adverse inferences against Pipkins' credibility because she exercised her legal right to allege before another government agency that her termination was due to racial discrimination.[3]

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[2] At times relevant, he was one of several stewards for OPEIU Local 42, which the Respondent recognized as the representative of its nonclerical employees, including MR's.

[3] See R. Exh. 6, a claim she filed with the Michigan Department of Civil Rights on March 16, 2010.

I recognize the well-established precept that credibility finding is not an all-or-nothing proposition; witnesses may be found partially credible, since merely because a witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Dalikichi Sushi*, 335 NLRB 622, 622 (2001); *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Instead, the trier of fact may appropriately weigh the witness' testimony with the evidence as a whole and evaluate its plausibility. *Golden Hours* at 798–799; see also *MEMC Electronic Materials*, 342 NLRB 1172, 1200 fn. 13 (2004).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent, an unincorporated association with a main office in Detroit, Michigan, is a labor organization that represents approximately 55,000 members who work in hospitals, nursing homes, and home health care services throughout the State of Michigan. The Respondent has admitted jurisdiction as alleged in the complaint, and I find accordingly.

Pipkins worked for the Respondent at its Detroit office as an MR (or business agent) in the representation department from January 9 until her termination on September 17. Flucker supervised the department, which had about 12–14 MR's, the majority of whom were Black. Each MR was assigned to particular facilities and engaged in a variety of activities servicing members, including site visits relating to grievances or contract negotiations.

Likely exacerbated by the difficulties that labor organizations face in today's economic climate, the general workplace atmosphere in the representation department clearly was stressful, as reflected in testimony from both the General Counsel's and the Respondent's witnesses. In this regard, the following language in the employees' handbook is revealing: "[W]orking in the labor movement is tough, demanding work, which requires that employees frequently work long and irregular hours, including many weekends and evenings."[4]

Three other provisions of the handbook are also pertinent. The first concerns production quotas and performance goals:[5]

> Employees . . . are routinely assigned specific numerical objectives, which they must achieve in their work. These objectives include, without limitation, deadlines, budgetary limits, and making termination and recruitment quotas.
>
> Employees are expected to meet all production quotas and numerical

[4] GC Exh. 2 (Manual of Policies and Procedures) at 9.
[5] Ibid at 14.

performance goals, just as they are expected to perform all other aspects of their work . . . .

The second provides that employees are expected to utilize the organizational chain of command in dealing with work-related issues, with step 1 the supervisor, step 2 the department director, and step 3 the president or his/her designee.[6]

The third states that the Respondent maintains no formal system of discipline but may exercise progressive discipline in its discretion.[7]

Nursing Home Action Agenda

In about April, the Respondent formulated a plan to survey nursing home members statewide regarding the issues affecting them, to serve as the basis to drive the nursing home division in the next 3 to 5 years.[8] It set out a time line for launching a multi-step, member-driven strategy that would be unveiled at the September Detroit stewards' conference. A steering committee composed of nursing home executive board members and other identified key nursing home leaders would be formed, to brainstorm and draft a list of issues affecting nursing home workers.

Faville appointed Pipkins and Mary Nelson (who was not in the representation department) to that committee, as well as to a related staff committee. Both committees subsequently met a number of times. The record is unclear which committee met when, and I will treat them together.

Pipkins attended her first meeting on about April 21, with Nelson, Director of Communication Bob Allison, and Director of Government Affairs Zac Altefogt. Allison explained the purpose of the plan was to increase nursing home workers' involvement in the Union. He spoke about the process of printing and circulating the surveys and the importance of collecting information from the maximum number of people. He also stated that MR's would in the course of their day-to-day business collect surveys and encourage members to turn them in.

Subsequent committee meetings took place once or twice a month. Chief of Staff Mark Raleigh and Directors Flucker, Johnstone, and Jolliffi attended later meetings. By the second or third meeting, the final version of the survey was finished.[9]

Pipkins testified as follows. In July, Faville held a meeting with Flucker and the MR's in a conference room. During the meeting, Pipkins raised concerns about what would happen if MR's did not get their surveys in. She stated that the nursing home agenda was turning into something punitive and cited Raleigh's comment that he did not want to count surveys without names on them and Jolliffi's statement that the member

[6] Ibid at 40.
[7] Ibid at 52.
[8] See GC Exh. 5.
[9] See GC Exh. 4, two pages of questions with answer boxes to check.

services department would check behind the MR's to confirm that members attended the meetings at the facilities. Faville responded that she disagreed with Pipkins.

Pipkins also testified about a conference call that Faville conducted with all MR's and Flucker in June or July. According to Pipkins, Faville specifically said during the call that MR's would have to get completed surveys from a minimum number of members by individual facility and that mailed in surveys would no longer be counted.

However, neither Flucker or Furlow, or Faville, nor any other witness, corroborated Pipkins' testimony that there was such a meeting or conference call between Faville and the MR's. Accordingly, and taking into account problems with Pipkins' overall credibility, I decline to find as facts that such a meeting or conference call occurred.

Returning to what I find to be facts, in or before mid-August, Pipkins attended a committee meeting or meetings at which Raleigh said he did not want surveys that lacked members' names, and at which Jolliffi said that the surveys were a mandate, and MR's who did not meet their required number of surveys or quotas were probably going to be disciplined. Pipkins reported this to Furlow and other MR's, who requested a meeting on the matter.

Such a meeting was held on about August 17,[10] in Flucker's office, with Pipkins participating by telephone. She related what Raleigh and Jolliffi had stated. Flucker responded that Pipkins should not be saying anything about discipline because nothing concrete had been decided. Pipkins reiterated what Jolliffi had said. According to Furlow, Pipkins and Flucker argued back and forth, and Flucker testified without controversion that the conversation ended with Pipkins being upset and hanging up.

August 19 Conference Call

On the afternoon of August 19, Faville conducted a conference call with all of the MR's, who were either grouped in Flucker's office or participated by phone. Faville set it up after reviewing a report giving updated survey returns from each MR by facility. During the call, Faville reviewed with each MR his or her progress. She commended a few for their results, including Rudi Mauch (a Caucasian) and questioned others (including Alan Orta, who is Hispanic, and LaToya McDaniel, who is Black) as to why they had not reached their goals. Furlow testified without controversion that he voiced concerns the MR's had about the process because he was one of their spokespersons in his capacity as a steward.

Pipkins and Flucker testified about what happened after the call (Furlow did not). Their accounts were fairly similar on many points, but where they differed, I credit Flucker's as more reliable and less self-serving. Some of the MR's complained that they had reached their goals yet not received accolades. Furlow stated that he was not

[10] Vis-à-vis Pipkins and Flucker, Furlow gave the most specific date frame for the meeting, and I credit him on point. Tr. 291.

going to collect any more surveys and then laughed. After that, Pipkins and perhaps others stated that they were not going to collect any more either, and they laughed about it.[11] Regardless of how serious they were, Flucker told them that this was not the time for those statements and that they needed to continue with their work. She did not report the incident. However, the following day, Raleigh called Faville and informed her that he had overheard MR's grumbling about the surveys.

Flucker testified that she did not report any employee complaints concerning survey goals and personally disagreed that such goals be set.

August 28 Meeting

On the afternoon of August 28, Faville met with Flucker and all of the MR's in a conference room. She opened by stating that she had heard of dissatisfaction among the MR's and wanted to clear the air. She asked them, one-by-one, to state their concerns, and they did so. For example, Kim Fowlkes and Carso Jones raised issues they had with Flucker, and Dave Robertson said something about his region unrelated to the surveys.

Pipkins testified that the thrust of her voiced concerns was racial discrimination rather than the surveys per se.[12] In this regard, she testified that she accused Faville of having been harsher in the earlier conference call with minority representatives vis-à-vis Caucasian representatives and that she considered this unfair, and that Faville denied any such discrimination.

In contrast, no other witnesses testified that Pipkins specifically raised racial discrimination as an issue. According to Flucker, Pipkins was vocal in speaking about what Jolliffi had stated regarding discipline if MR's did not meet their survey goals, and Pipkins and Furlow raised the prior conference call and the accolades that Mauch had received; Furlow did not describe anything Pipkins or he said at the meeting; and Faville testified that Pipkins made a comment to the effect that she would not have volunteered to be on the committee had she known that the survey goals would be mandates.

A claim of racial discrimination is certainly considered a significant matter in today's workplace, and lack of corroboration from Flucker and Furlow that Pipkins made such an accusation undermines her credibility on this point. Also significant in this regard is Pipkins' admission that nowhere in her affidavit to the NLRB did she state that she raised the issue of racial discrimination with Faville.[13]

At some point, Pipkins spoke about what Jolliffi had stated regarding discipline if MR's did not meet their survey goals. However, she testified that other MR's, including

[11] Pipkins also testified that the statements were made in a jocular vein. As she put it, "[I]t was a running joke." Tr. 52.

[12] See Tr. 74.

[13] Tr. 142. The only mention of race in her affidavit is that Mauch is White and McDaniel Black. Tr. 183.

Nelson, also complained in connection with the mandates, and she was not certain which MR raised the subject of discipline.[14]

When Furlow's turn came, he commented that he would "ride it out" with Faville,"[15] Faville told him to stop, that she had heard him talking "bullshit" about her in the parking lot.[16] She also said, "Not only that. You and Stefani don't like doing the surveys or the extra work for the members."[17] It is undisputed that Pipkins denied the assertion and asked who had said that about her. I credit Faville and Furlow's testimony that Faville answered it was Raleigh, over Pipkins' testimony that Faville did not disclose his name to her until a monthly all-staff meeting on September 14.

In any event, at the September 14 meeting, Pipkins raised the matter of what Raleigh had reportedly said against her, stating that it was a lie. Faville responded that they could take care of that at the next monthly staff meeting, when Raleigh would be back from leave.

When asked on cross-examination why she considered mandates punitive, Pipkins did not offer a cogent explanation. She first answered that she volunteered for the nursing home action committee outside of her regular work duties, but it then became mandatory. Next, she testified that it was punitive because she was one of the MR's assigned to do the surveys, not necessarily because she was on the committee. Also during cross-examination, Pipkins admitted that she did not know if the Respondent adopted Raleigh's proposal not to count unsigned surveys, because Allison disagreed with him. No MR was ever disciplined for failing to meet his or her survey goals or quotas.

September 15 General Membership Meeting

On the morning of September 15, Director of Negotiations McMillan sent Pipkins an e-mail, notifying her that she was assigned to be the lead negotiator for Luther Haven,[18] one of the facilities she serviced. Previously, Pipkins had assisted in negotiations but never served as the lead negotiator. Faville testified that this was a new responsibility for Pipkins but not a promotion, because all MR's negotiate contracts.

That evening, in the auditorium, Faville conducted an open meeting of union officials, executive board members employees, and union members. Approximately 100 persons attended. As Faville finished giving a report on the home health service division, Frazier stood up, raised her hand, and stayed standing until Faville recognized her. Frazier stated that she had heard all the nice things Faville had said, but they were having problems at TMH, which she described. Faville assured her the Union would do everything it could. She asked who the union MR was. Pipkins stood up and stated

[14] Tr. 78–79; Tr. 152.
[15] Tr. 294.
[16] Tr. 359.
[17] Ibid.
[18] R. Exh. 3.

that she was. Faville asked if she could have an action plan ready in 2 weeks. Pipkins responded that she had been working on one with Flucker and Clark and could have it to her tomorrow.[19]

After the meeting, both McMillan and Jolliffi testified, they spoke with Faville about the incident. Faville did not name them as among the people who came up to her afterward concerning the matter, leading me to the conclusion that she and they did not make a deliberate attempt to mesh their testimony but testified from genuine recall. I credit them, noting that their testimony comported with Flucker's account of what Faville told her later that evening. McMillan told Faville that she was very surprised someone would do that in the middle of a general membership meeting and that she had never seen such behavior. Jolliffi described Faville as visibly shaken and asked if she was okay. Faville replied yes.

Following the meeting, Faville approached Flucker in the parking lot, where they had a conversation. Their recollections were quite similar and not inconsistent. Faville asked, "What the hell was that?"[20] Flucker asked what she was talking about. Faville asked if she had not heard Pipkins. Flucker replied that she had stepped out (to speak with a member). Faville explained what had occurred and that Pipkins had better have the plan on her desk the next day. Flucker said that she would take care of it.

The divergence of testimony between the General Counsel's and the Respondent's witnesses on the September 15 meeting primarily concerned Pipkins' demeanor and tone of voice rather than her words themselves.

Thus, Pipkins, Furlow, and Johnstone depicted her tone and demeanor as normal and respectful. In contrast, Faville used "snotty, condescending, disrespectful;" McMillan "very rude and disrespectful;" and Jolliffi "very insolent and very rude," based on Pipkins' tone of voice and the body movements of her head and shoulders.[21] Perhaps most accurately from an objective point of view, Frazier chose "confident."[22]

I am mindful that perceptions about what is or is not respectful are viewed through the filter of predisposition, and witnesses' characterizations may be colored by their desire to help one side or the other. Weighing the respective versions, I conclude that Faville genuinely construed Pipkins' behavior as disrespectful, regardless of Pipkins' subjective state of mind. Several factors lead me to this outcome. Their dialogue occurred in the context of an atmosphere that Faville no doubt found unpleasant: Frazier essentially challenged her statements that the Union was doing a good job representing nursing home members. Frazier's depiction of Pipkins' tone as "confident" suggests an element of "attitude" or that Faville could have reasonably perceived such. Further, although Johnstone testified that Pipkins' tone was normal

[19] Other accounts had Pipkins stating that she would have it the following morning, but the difference is immaterial.

[20] Tr. 372.

[21] Tr. 369–370, 410, 423.

[22] Tr. 195.

and respectful, she testified on cross-examination that in her meeting with Faville on September 16 concerning Pipkins, Faville "seemed upset that she had been challenged" and stated that this was not the first time Pipkins had "publicly challenged" her.[23] Finally, Flucker's and Jolliffi's accounts reflect that Faville evinced strong emotions to the incident immediately after its occurrence.

Events of September 16 and17

One of the few undisputed facts is that Faville did not receive the TMH action plan on either September 16 or 17. Similarly, there is no disagreement that Faville's office is located within feet of the MRs' cubicles and off the hallway that leads to the break room. On many other matters, testimony was conflicting, either implicitly or directly to the point that someone was untruthful.

Pipkins testified that about a week prior to September 16, Clark and she had already put together an action plan (General Counsel's Exhibit 9) and needed only to finalize certain details. They met with Flucker in her office on the afternoon of September 16 and reviewed it. Flucker told Pipkins and Clark that Faville was unavailable but that the plan was done, and they would give it to Faville the following day. Afterward, Clark and Pipkins continued to work on the stickers for the plan, and Pipkins left work at about 5 or 5:30 p.m. Flucker's account was substantially the same. She testified that she also said the plan would have her approval once Pipkins added dates to achieve certain goals.

In direct contradiction to their testimony, Clark averred that she never saw General Counsel's Exhibit 9 before it was shown to her at the trial, never saw any written action plan, and did not meet with Pipkins and Flucker on September 16.

The Respondent maintains records of entry into various areas of the facility (exits are not recorded). They show that on September 16, Faville's first entry was at 8:24 a.m. and her last entry at 7:37 p.m.,[24] corroborating Faville's and MacMillan's testimony that the former was in the office throughout the day. I so find. They also tend to lead credence to Faville's testimony that she saw Pipkins several times that day, but they did not speak to each other. On the other hand, they cast doubt on Pipkins' and Furlow's assertion that they never saw Faville at all on September 16.

Faville met with a number of people that day, including Flucker in the morning. Flucker stated that she wanted to talk about last night. Faville replied that she was a little calmer than last evening but still upset that Pipkins had disrespected her in front of the membership. Flucker responded that she was working with Pipkins. Faville replied that Flucker needed to work with her a lot because this could never happen again and that she had thought last night of firing Pipkins but was probably going to suspend her. Faville further stated that Pipkins had better get the plan to her that day.[25]

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[23] Tr. 224; 220.

[24] R. Exh. 8 at 2.

[25] This apparently was the same conversation that Flucker testified occurred on September

Continued

Entry logs further show that on September 17, Faville first entered at 10:58 a.m. and last entered at 3:49 p.m.[26] That day, she called in her senior leadership team, which included Jolliffi, Chuck Lobaito, and Attorney Chris Mikula. She told them that she was terminating Pipkins for disrespecting and humiliating her at the meeting and then failing to provide her with the plan on the following day.[27] She directed Mikula and Jolliffi to give Pipkins the termination paperwork.

Pipkins reported to work at about 8:30 a.m. on September 17. That morning, she sent an e-mail to Mikula, Flucker, and Clark, with a copy to Faville, concerning problems at TMH.[28] Rather inexplicably, she made no mention therein of the action plan. She left for fieldwork at about 4 p.m. and subsequently received an e-mail directing her to return to the facility. She was at her cubicle at 5:15 p.m., when Jolliffi came over and told her to accompany her. They went to Mikula's office, where Mikula informed Pipkins that they were letting her go. She asked why. Milkula handed her a termination letter dated September 17 and signed by Faville.[29] Afterward, Jolliffi accompanied Pipkins back to her desk, where she retrieved her notebook and purse.

Pipkins testified that she had the action plan on her person all day on September 17 and tried to tell Jolliffi in Mikula's office that she had it with her. She later testified that she did tell Mikula, Jolliffi, and Lobaito that she had it in her hand. She also testified that she left the plan in the center of her desk when she left.

In direct opposition, Jolliffi, testified that Pipkins made no attempt to hand her any documents or give her a plan and never stated that she had a TMH plan; moreover, Jolliffi never saw such a plan on Pipkins' desk. Flucker could not recall if she saw it there after Pipkins' termination.

Faville testified that she talked to Flucker following the termination, but the latter never said there was a written plan or gave her one. She further testified that she never saw a TMH plan and that June 7, 2010 was the first time she saw General Counsel's Exhibit 9. Flucker testified that she did not know whether Faville ever received a plan.

At trial, Faville stated that she made the decision to terminate Pipkins due solely to the latter's conduct at the September 15 general membership meeting and subsequent failure to turn in the TMH plan, taken together.

Analysis and Conclusions

The framework for analyzing alleged violations of Section 8(a)(1) turning on

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17, in which Faville referenced the September 15 meeting and Pipkins' failure to provide her with the plan and said she had a mind to fire her.

[26] R Exh. 8 at 2.

[27] She gave the same reasons for Pipkins' discharge to Furlow and Johnstone on September 18, in separate conversations.

[28] R. Exh. 5.

[29] GC Exh. 6. It stated no reasons for the termination.

employer motivation is *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (not reported in Board volumes). Under **Wright Line**, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under **Wright Line**, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399−403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). Where an employer's stated reason for its actions is found to be pretextual, i.e., is either false or not, in fact, relied upon, then by definition the employer has failed to meet its **Wright Line** burden. *CSS Healthcare Services, Inc.*, 355 NLRB No. 5 (2007); *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991).

The initial question is whether the employee's actions were concerted in nature. An individual employee acting with or on the authority of other employees and not solely on his or her own behalf is engaged in concerted activity. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 942 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand *Meyers Industries (Meyers II)*, 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity encompasses an individual employee who seeks to initiate, induce, or prepare for group action, or who brings group complaints to management. *Meyers II*, 281 NLRB at 887. Conversely, it does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union* 412, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984).

The August 17 meeting with Flucker was set up at the request of employees, after Pipkins reported to them changes in the procedure for obtaining their quotas of surveys. At that meeting, Pipkins essentially served as a spokesperson for the MR's in the discussion with Flucker. At the August 28 meeting with Faville, Pipkins again raised issues about the consequences for MR's for not achieving their quotas, and other employees voiced similar concerns. I conclude that these activities of Pipkins were concerted. They were protected activities as well, since they related directly to employees' terms and conditions of employment. I note that the protection of protected activity does not depend upon the merit or lack of merit of the grievance or complaint. See *Skrl Die Casting, Inc.*, 222 NLRB 85, 89 (1976); *NLRB v. Guernsey-Muskingum Electric Cooperator, Inc.*, 285 F.2d 8, 12 (6th Cir. 1960).

On the other hand, statements that Pipkins made at the September 14 meeting denying the accusation that she had said she did not like doing the surveys, and at the September 15 meeting about the TMH action plan, related solely to herself and did not seek or entail any kind of group action. Therefore, they were not concerted in nature. Pipkins' statements after the August 17 meeting with Flucker, whether or not made in jest, were that she was not going to collect more surveys, in direct controversion of management's directives. I conclude that they did not constitute protected activity, even leaving aside the provision in the employees' handbook specifically stating that employees must comply with all production quotas and numerical performance goals.

As to knowledge, Pipkins' protected activities at the August 28 meeting were in the presence of Faville. I next turn to her statements at the August 17 meeting with Flucker. A supervisor's knowledge of an employee's protected activity is ordinarily imputable to a respondent. *State Plaza Hotel*, 347 NLRB 755, 756 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001). However, an exception to this general precept is made when credited testimony has established that a supervisor who learned of union activities did not pass on the information to others. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983); see also *Kimball Tire Co.*, 240 NLRB 343, 344 (1979). Flucker, whom the General Counsel called as a friendly witness, testified that she personally disagreed with the Respondent's policy of setting survey goals and that she informed no one of complaints she heard from employees about the surveys. In light of Flucker's credited, unrebutted testimony, I conclude that knowledge of Pipkins' statements at the August 17 meeting with Flucker is not properly imputable to the Respondent.

Based on the above, I will consider only what Pipkins said to Faville on August 28 about the surveys as protected concerted activity known to the Respondent.

The complaint alleges no independent violations of Section 8(a)(1), and there is no direct evidence of animus toward Pipkins for engaging in the above activity. Anger that Faville expressed at Pipkins at the August 28 meeting was for purportedly stating that she did not like doing the surveys. Her later negative statements all related to Pipkins' "disrespectful" conduct at the September 15 meeting and her subsequent failure to provide the TMH action plan, and had nothing to do with the surveys. The General Counsel in her brief (at 38) raises Johnstone's unrebutted testimony that Faville on September 16 stated that Pipkins had "publicly challenged" her before. The qualifier "publicly" suggests a broader audience than the representation department, but in any event, I have difficulty concluding that Pipkins' statements at the August 28 meeting, even if she is fully credited, constituted a "challenge," especially when Faville called the meeting to solicit the MR's concerns and complaints, and most, if not all, MR's voiced them.

Animus may be inferred from the totality of circumstances and the record as a whole, considering such factors as, inter alia, suspicious timing, disparate treatment, and advancing shifting reasons for the action. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001); *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992); see also *Real Foods Co.*, 350 NLRB 309, 316 (2007). Similarly, the Board evaluates all of the circumstances of a particular case to determine whether the timing

of the employer's actions suggests that it seized an opportunity to mask its true motivation. *Case Farms of North Carolina, Inc.*, 353 NLRB No. 26 at slip op. 6 (2008).

Here, Pipkins' discharge occurred approximately 3 weeks after the August 28 meeting, certainly not a long period. However, intervening events militate against finding any suspicion in timing: not only the September 15 meeting and the events of September 16 and 17, but the notification to Pipkins on the morning of September 15 that she was going to be made a chief negotiator for the first time. I cannot believe that the Respondent was Machiavellian and disingenuous to the point where it prepared and gave Pipkins such a notification when it already intended to fire her for her conduct on August 28, simply to manufacture evidence in its defense if the discharge went to an NLRB trial. Accordingly, I do not find the timing of the discharge to be indicative of unlawful animus.

As far as disparate treatment, the record does not reflect that any other employees have engaged in similar conduct for which Pipkins was discharged. Moreover, the Respondent does not maintain a system of progressive discipline or have established procedures for employees to challenge proposed disciplinary actions. Finally, Faville has been consistent in citing the reasons for Pipkins' discharge, both to witnesses at around the time of its occurrence and at the hearing.

Lastly, I will consider the Respondent's defenses to determine if any animus can be inferred from them. The Respondent contends that Pipkins' discharge was based on her conduct at the September 15 meeting and her failure to turn in the action plan, taken together.

I have concluded that, regardless of Pipkins' intent, Faville was perturbed by what she considered Pipkins' disrespectful conduct toward her at the meeting, in front of 100 or so people.

Regarding the events of September 16 and 17, and crediting Pipkins and Flucker that a plan was completed on the afternoon of September 16, I am perplexed by Pipkins' failure to provide it to Faville at that time. At the September 15 meeting, Faville asked her to have it within 2 weeks, but Pipkins promised to provide it to her the next day. Crediting Pipkins and Flucker that Faville was not available to meet with them and Clark on the afternoon of September 16 does not answer the question of why getting the report into Faville's hands on September 16 or 17 would have been difficult. Faville was in the office both days, and she and Pipkins worked in the same suite of offices and were readily accessible to one another. Thus, even had Faville not been personally present and available on those days, nothing in the record explains why Pipkins could not have left the action plan in Faville's personal office or with Faville's secretary instead of apparently waiting for a formal face-to-face meeting to be arranged. In the same vein, I cannot fathom why Flucker did not take steps to furnish Faville with such a plan, even when, according to Flucker's own testimony, Faville told her prior to Pipkins' termination that Pipkins' job was in jeopardy because she had not submitted it.

In her brief (at 40), the General Counsel cites the chain of command provision to argue that Pipkins could not be expected to give the plan directly to Faville. However,

this argument ignores the fact that Faville certainly had the authority to instruct Pipkins to bypass Flucker and deal directly with her, and she exercised it here.

In sum, either the plan did not exist, or Pipkins (and Flucker) failed to take reasonable steps necessary for Faville to receive it. Either way, Pipkins did not provide the plan to Faville on the day she sua sponte promised or even on the following day.

I conclude that the reasons the Respondent has advanced for Pipkins' termination were not pretextual and that, based on all of the circumstances I have set forth, the General Counsel has not established animus, either by direct evidence or circumstantially. Therefore, the General Counsel has failed to establish a prima facie case of unlawful discrimination under Section 8(a)(1).

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent has not engaged in any unfair labor practices under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 18, 2010.

Ira Sandron
Administrative Law Judge

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes